DECISION

Fair Work Act 2009
s.483AA—Right of entry

United Workers' Union
(RE2023/147)

DEPUTY PRESIDENT BEAUMONT PERTH, 10 MARCH 2023

Application for an order to access non-member records

1 The issue and outcome

[1] On 27 February 2023, Ms Louise Dillon of the United Workers' Union (the **UWU** or the **Union**) applied to the Fair Work Commission (**Commission**) under s 483AA of the *Fair Work Act 2009* (Cth) (the **Act**) for an order to access non-member records. The application concerns records held by Ensign Services (Aust) Pty Ltd, trading as Linen Services Australia (the **Respondent**).

[2] Ms Dillon is an employee of the UWU and holds an entry permit issued by the Commission (RE2020/194). There are no conditions imposed on the permit holder's entry permit although it is noted that the permit expires on 12 March 2023.

[3] The Union's primary contention appears to be that the Respondent has underpaid employees, failed to correctly audit the same underpayment, and now denies access to documentation that could validate whether the contravention has been remedied. It is on this basis the Union contends that the Respondent has contravened s 50 of the Act, that the contravention has not been remedied and as such, is still occurring.

[4] The matter was set down for ex-parte hearing on 8 March 2023. Prior to the hearing the UWU advised that the order it sought under s 483AA should remain in force for a period of one month from the issuance date.

[5] The Union seeks production of the following documents under s 483AA(1)(b) of the Act:

a) contracts of employment;
b) rosters;
c) time sheets;
d) pay slips;
e) any signed 'variation letters' that were signed by staff when additional hours were worked;

f) audit documents produced by the Respondent to resolve the alleged underpayment; and
g) any other time and wages records,

that fall within the period 20 March 2020 to 21 April 2022 and relate to all employees employed by Ensign Services (Aust) Pty Ltd under the *Ensign Services Murdoch Laundry Western Australia Enterprise Agreement 2020* (the **Ensign Agreement**)[1] at 6-10 Bramanti Road, Murdoch, Western Australia, or any subset of the above documents, period, or class of employees that the Commission is satisfied is necessary for the investigation of the suspected contraventions.

[6] Briefly stated, I am not satisfied that the order sought in the abovementioned terms is necessary to investigate the suspected contravention. However, I do consider, as will be explained, that an Order should issue in respect of the production of time sheets, rosters and an 'audit sheet'.

[7] It is however noted that I will direct that the Order[2] and this Decision be served on the Respondent by the UWU by close of business 1600hrs (AWST) on 10 March 2023. I also direct, the Respondent must, within 24 hours after being served with the Order:

(a) display the Order at the Respondent's premises at a location where notices to employees are generally displayed; or
(b) make a copy of the Order available to employees through the usual means that are adopted by the Respondent for communicating with employees.

[8] Adopting the approach of the Deputy President in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*[3] the Respondent and/or non-member employee may apply within seven days from the date of the Order to have this Order set aside should there be lawful grounds to do so. Such application, if any, should be made in the prescribed form (Form F1 of the *Fair Work Commission Rules 2013*) and served on the UWU within 48 hours of it being made.

[9] The Order to investigate the suspected contravention will take effect from the date of this Decision and will operate for a period of one month.

[10] The Order has been issued with this Decision.

2 Background

[11] The background to this matter is extracted from the witness statements of:

a) Mr Rhys David James, an Industrial Officer of the Union;
b) Ms Dillon, a Coordinator of the Union; and
c) Ms Elizabeth Vergara, an Organiser of the Union;

[12] The Union gave notice under s 183 of the Act, as a bargaining representative, that Ensign Agreement would cover it.[4]

[13] UWU is entitled to represent laundry workers under Schedule 1, Part A, Part 1 of its rules.[5]

[14] The Western Australian members of UWU are employed as laundry workers, under the Appendix of the Ensign Agreement, Table 2. Through the operation of clause 2(c), the Ensign Agreement applies to their employment. The Ensign Agreement commenced operation on 20 March 2020 and does not reach nominal expiry until 20 March 2023.[6]

[15] The Ensign Agreement is a fair work instrument, as defined by s 12 of the Act.

[16] Ms Vergara gave evidence that the workers at the Respondent's site are from diverse backgrounds, and they are unfamiliar with their workplace rights and the Ensign Agreement.[7] Ms Vergara noted that she holds a right of entry permit, and she has accessed the Respondent's Murdoch site, generally once a fortnight.[8]

[17] In mid-2021, the Union was distributing copies of the Ensign Agreement at the Respondent's site, when Ms Vergara asked members whether they were receiving overtime for additional hours worked.[9] Ms Vergara was informed by members that they were signing a document to work additional hours and receive ordinary rates of pay.[10] Ms Vergara provided a copy of the document which read, in part:

> RE: Variation of ordinary hours on the …/…/… date
>
> Consistent with the Ensign Services Murdoch Laundry WA Enterprise Agreement 2020 ("the Agreement"), I, ……., have been offered and hereby agree to work…… (number) of ordinary hours outside my contract working hours arrangement on above date.
>
> Other Conditions of Employment
>
> This letter constitutes a variation to my existing employment agreement, and is to be read in conjunction with that agreement. My Terms and conditions of employment continue to be as provided for in my existing employment agreement, other than as varied by this letter.[11]

[18] In early 2022, the Union identified suspected underpayments of overtime entitlements for members employed by the Respondent.[12]

[19] The Union submitted that under the Ensign Agreement, there is no recognition of ordinary hours worked 'outside' of contracted hours. The Union holds the view that part-time employees who worked additional hours above their contracted hours would receive overtime rates for all additional hours worked.[13]

[20] The Union contended that under clause 9 of the Ensign Agreement, employees are entitled to overtime for any hours worked in excess of their ordinary rostered hours. Additionally, clause 14.4 of the Ensign Agreement states that where an employee's hours of work exceed 7.6 hours per day or 38 hours per week, they are to be paid at overtime rates. Similarly, if an employee is given less than 24 hours' notice to work a shift, unless mutually agreed, then the entire shift attracts the 200% overtime rate.

[21] Overtime rates are prescribed in clause 9 of the WA Agreement and are paid at the rate of 150% for the first two hours and 200% thereafter.

[22] The Applicant filed a Form F10 with the Commission on 25 March 2022, to resolve the above interpretive issue in matter no. C2022/1971.

[23] According to the Applicant, following filing, the Respondent provided a response and also discussed the issue with UWU in a Joint Consultative Committee meeting.[14] The outcome of the response and discussions was that the Respondent undertook to conduct an audit and backpay employees for any hours that ought to attract overtime, in line with UWU's interpretation of the Ensign Agreement.[15]

[24] The UWU subsequently discontinued its application in C2022/1971 on the basis that the dispute had been resolved, pending the audit.[16]

[25] The UWU submitted that the Respondent completed the audit in early April 2022, with corrective payments made by April 2022 to impacted employees.[17]

[26] Ms Vergara stated that from around 20 April 2022 she had members approach her on the Respondent's site showing her letters that summarised how much backpay they had received in a payment made on 19 April 2022.[18] Ms Vergara said that her part-time members on site were telling her they were expecting a few thousand dollars in backpay based on the hours they recall working but had received a few hundred dollars. Ms Vergara explained that members were comparing the amounts received with each other and did not believe they had been paid correctly. Ms Vergara formed the view that some of the payments did not cover the additional hours worked in a single week, let alone the two years that the Ensign Agreement had been in force. Ms Vergara said that this led her to believe that they, presumedly the members, had only received backpay for hours worked in excess of 7.6 hours a day, not in excess of their contracted hours.[19] Ms Vergara noted that she raised her concerns with Ms Sayed, the Industrial Officer for the UWU, in May 2022.[20]

[27] The UWU subsequently requested from the Respondent evidence of the audit, so that the accuracy of underpayments could be verified.[21]

[28] The Union said that the first request for information was made on 19 April 2022, with the Respondent responding on the same day, stating that it did not think that it could provide the names of employees due to privacy/confidentiality reasons, but it may be able to provide audit sheets with those details removed.[22] The State General Manager, Brian Griffin, noted in the email correspondence that he would consult with the 'Employer's HR department' before providing any information. On 20 April 2022, the UWU confirmed to the Respondent that this would be acceptable.[23]

[29] Mr James explained that in July 2022 he was provided with a case file from his predecessor that related to alleged underpayments under the Ensign Agreement. His predecessor had been unable to verify whether the underpayment had been remedied following a dispute brought to the Commission under s 739 of the Act.[24]

[30] Mr James stated that the case file for the matter, presumedly the Union's case file, contained two contracts of employment.[25] Ms Elizabeth Vergara, an Organiser with the Union, had obtained payslips for the period in issue and employment contracts from four members and a remediation letter issued by the Respondent that had a handwritten underpayment amount.[26] Mr James said based on this information, he could only inform Ms Vergara's team that the handwritten underpayment amount equalled a given number of hours of overtime for the impacted member.[27]

[31] Mr James detailed that he was unable to determine whether the back payment covered all additional hours worked, including hours worked in excess of 7.6 hours a day, or hours worked in excess of 38 hours per week. Further, it was unclear from the payslips provided whether pay cycles were fortnightly or weekly which would impact calculations significantly because he could not tell whether the hours worked were in a week or two week period, which would impact calculations for overtime on hours worked in excess of 38 hours in a week.[28]

[32] On 5 July 2022, Mr James wrote to Mr Griffin informing him that he now had carriage of the matter on behalf of the UWU. The email dated 5 July 2022 time stamped 4:16PM continued:

> As previously stated, UWU seeks to audit the underpayment conducted by Ensign, to alleviate concerns around the accuracy of the audit and the quantum of backpay provided to employees. In order to achieve this, I seek access to member records pertaining to Mr Joseph Santos Castillo. UWU aims to use Mr Castillo as an example that validates the underpayment calculations performed by Ensign and assure other members that the audit is reliable.
> Specifically, we seek payslips, and timesheets or rosters for the period October 2020 to 19 April 2022 for Mr Castillo. I also seek a copy of any contract/s of employment that applied to Mr Castillo during the period. I also ask what specific timeframe pay slips relate to, i.e. are pay slips for weekly or fortnightly periods?
> I ask that rosters, timesheets, payslips and contracts relating to Mr Castillo are provided, by agreement, by 10:00 AWST, Monday 11 July 2022.[29]

[33] Ms Vergara gave evidence that prior to Mr James sending the aforementioned correspondence she had spoken with Mr Castillo and discussed with him whether he wanted to audit his backpay to see if it was correct.[30] Ms Vergara said that Mr Castillo informed her that he was fine to participate.[31]

[34] According to Ms Vergara she spoke to Mr Castillo again, noting that he had informed her of the following:

> He said he had been pulled into the office. He was asked if he was authorising the union to get his records. He said to me he was scared because he had been pulled off the floor and felt like he was targeted. He said to me that he told Ensign he wasn't concerned and didn't want to participate.[32]

[35] By email dated 6 July 2022 time stamped 3:46PM, Mr Griffin responded to Mr James' email dated 5 July 2022, as follows:

> Hello Mr James,

> As previously advised to the UWU, Due to privacy requirements, we are not in a position to share any employees confidential personal information.
> Please note that I can reconfirm the Ensign did conducted an Audit of all PT employees who may have been effected by this error including Mr Castillo. Post the audit any errors that where identified, we provided all employees affected with details of any error in writing. The monies owed to Mr Castillo and all other affected employees was paid to them on the 12/4/2022 along with a letter provided giving details of the Audit and any payment owed and made.
>
> I hope that this brings you up to date.
>
> Currently my National HR Manager is way on annual leave and I will need to raise this particular request re Mr Castillo upon her return . As such we would be unable to meet your requested time line. We will endeavour to respond to your query during the week commencing 18th July 2022.
>
> Thank you for your Understanding.
>
> Regards
> Brian[33]

[36] By further email dated 21 July 2022, Mr Griffin wrote to Mr James in the following terms:

> Mr James,
>
> Our Operations Manager Phani Rao met with Mr Castillo yesterday evening upon his return to work from personal leave with the PM shift Union Delegate Rosemarie Anliban Belen . The objective of the meeting was to understand the Ensign - Alleged overtime underpayment and subsequent audit (UWU ref: 2021-6125) from complaint his perspective and ask him if he wished sign a letter of authority form provided by Elizabeth allowing us to release his personal details to the United Workers Union so that you could act on his behalf.
>
> Joseph advised us that he does not have any issue with respect to part time back payment. Further he advised us that he was approached by Union Rep, asking to sign the papers & give 3 payslip. He has e-mailed payslips but didn't wish to sign the papers.
>
> He was asked if he had any about any concern in relation to this part time back payment, & do you want Ensign and the Union further investigate?
>
> He confirmed again, he does not have any concerns and is comfortable that he has received all back payments owed. As such he advised us that he is not willing to sign papers since , he is not comfortable giving the UWU authority to act on his behalf in this matter.
>
> As such Ensigns position remains the same. We are unable to share any private details of our employee without the correct authority from that employee or unless directed to do so legally.
>
> As there is no complaint from Mr Castillo we consider the matter closed.

[37] Ms Vergara stated that she was concerned that if the Union disclosed a list of members during the course of right of entry under s 481, that the members would be targeted like the member mentioned above, and adverse actions would occur against its members.[34] Ms Vergara said that the Union is bargaining with the Respondent for a replacement agreement this year,

and the Union is concerned that knowledge of the membership would impact bargaining.[35] Ms Vergara added that she remained concerned that the Respondent has not properly back paid staff and that the Respondent is still applying overtime provisions incorrectly.[36]

[38] Ms Dillon gave evidence that whilst aware that she could exercise a right of entry under s 481, she held concerns that members would be targeted – having been informed by Ms Vergara and Mr James that one of the Union's members had been interviewed by the Respondent's Managers when the Union sought records by consent.[37]

[39] The UWU holds concerns that the Respondent has underpaid staff, failed to correctly audit the underpayment, and now denies access to documentation that could validate whether the suspected contravention has been remedied. The UWU has alleged and received tacit acknowledgement, it says, from the Respondent, that a contravention of s 50 has occurred. The Employer's subsequent correspondence and actions have caused the Applicant to suspect that the contravention of s 50 has not been remedied and is thereby continuing or is otherwise preventing the Applicant from alleviating their suspicions.

3 Legislation

[40] Under the Act a permit holder is permitted to enter premises and exercise a right under ss 482 or 483 for the purpose of investigating a suspected contravention of the Act or a term of a fair work instrument in certain circumstances. Section 481 provides:

> 481 Entry to investigate suspected contravention
>
> (1) A permit holder may enter premises and exercise a right under section 482 or 483 for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, a member of the permit holder's organisation:
>
> (a) whose industrial interests the organisation is entitled to represent; and
>
> (b) who performs work on the premises.
>
> Note 1: Particulars of the suspected contravention must be specified in an entry notice or exemption certificate (see subsections 518(2) and 519(2)).
>
> Note 2: The FWC may issue an affected member certificate if it is satisfied that a member referred to in this subsection is on the premises (see subsection 520(1)).
>
> Note 3: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.
>
> Note 4: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).
>
> (2) The fair work instrument must apply or have applied to the member.
>
> (3) The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting that fact.

> Note: A permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part).

[41] Section 482 of the Act sets out the rights that may be exercised whilst on the premises. Those rights extend to requiring an occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document (other than a non-member record or document) that is directly relevant to the suspected contravention and that is kept on the premises or is accessible from a computer kept on the premises.[38]

[42] The meaning of 'non-member record or document' is provide for in s 482(2A) of the Act in the following terms:

> 482(2A) Meaning of non-member record or document
>
> (2A) A non-member record or document is a record or document that:
>
> (4) relates to the employment of a person who is not a member of the permit holder's organisation; and
>
> (5) does not also substantially relate to the employment of a person who is a member of the permit holder's organisation;
>
> but does not include a record or document that relates only to a person or persons who are not members of the permit holder's organisation if the person or persons have consented in writing to the record or document being inspected or copied by the permit holder.

[43] However, there are circumstances whereby a permit holder may apply for access to a non-member record. Section 483AA sets out:

> 483AA Application to the FWC for access to non-member records
>
> (1) The permit holder may apply to the FWC for an order allowing the permit holder to do either or both of the following:
> (2)
> (a) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, specified non-member records or documents (or parts of such records or documents) under paragraph 482(1)(c);
>
> (b) require an affected employer to produce, or provide access to, specified non-member records or documents (or parts of such records or documents) under subsection 483(1).
>
> (2) The FWC may make the order if it is satisfied that the order is necessary to investigate the suspected contravention. Before doing so, the FWC must have regard to any conditions imposed on the permit holder's entry permit.
>
> (3) If the FWC makes the order, this Subdivision has effect accordingly.
>
> (4) An application for an order under this section:
>
> (a) must be in accordance with the regulations; and

(b) must set out the reason for the application.

[44] The objects of Part 3-4 at s 480 are:

480 Object of this Part

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

(a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:

(i) this Act and fair work instruments; and
(ii) State or Territory OHS laws; and

(b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and

(c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

[45] The objects of the Act as a whole, at s 3, relevantly provide:

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

….
(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms;….

[46] Section 483AA has been present in the Act since the Act came into force in 2009. However, it was not part of the original *Fair Work Bill 2008*, having been introduced as an amendment by the Government during Senate committee consideration.[39] Hansard, per Senator Ludwig (the responsible minister in the Senate) at [2175], outlines the reasoning behind the introduction of the amendment:

I will outline the position in the debate. The amendments would provide that a permit holder cannot inspect non-member records unless the relevant employee consents in writing or FWA orders that access be provided. Amendments would not apply to entry with respect to the TCF outworkers or entry under a state or territory OH&S law. I think that is clear. A non-member's record would be defined as a record that relates to the employment of a person who is not a member of the union. The amendments also provide that a permit holder will not be able to require access to non-member records. A permit holder will be able to seek an order from FWA giving them access to non-member records. FWA will be able to grant such an order only if it is satisfied that access is necessary to investigate a suspected breach relating to a member.

4 Ex parte hearing

[47] As noted, the UWU requested that the Commission hear the application on an ex parte basis, and I acceded to that request.

[48] Rule 6 of the *Fair Work Commission Rules 2013* (the **Rules**) allows the Commission to waive the requirement for service of the Form F43 filed by the Applicant. The Applicant of this application seeks access to non-member records held by the Respondent employed under the Ensign Agreement.

[49] Rule 41 of the Rules creates service requirements for various Commission forms, with Schedule 1 of the same containing the specific service requirements. Schedule 1 states that a Form F43 is to be served by the Applicant on occupiers and affected employers, subject to 'an order of the Commission'. Unlike most other services requirements, the instructions as to service for a Form F43 make it clear that the service requirement is subject to it being ordered by the Commission.

[50] In July 2019, the then President introduced a change to the Rules under s 609 of the Act. The accompanying explanation provided:

> The Commission must perform its functions in a way that is fair and just and open and transparent, but neither the Act nor the Rules previously made provision for affected non-member employees to be informed that such an application has been made or for them to make submissions. Item 15, Schedule 1 to the Rules Amendment introduces a new rule 34A that provides employees whose records are being sought through the application with an opportunity to make submissions to the Commission.[40]

[51] Rule 34A reads:

> **34A Application for an order for access to non-member records**
>
> (1) This rule applies if an application under section 483AA of the Act for an order in relation to non-member records is served on an occupier or affected employer.
>
> (2) At the time the application is served on the occupier or affected employer, it must be accompanied by a notice that sets out the effect of subrule (3).
>
> (3) The occupier or affected employer must, within 24 hours after being served with the application:
>
> (a) display the application at the occupier's or the affected employer's premises at a location where notices to employees are generally displayed; or
>
> (b) make a copy of the application available to employees through the usual means that are adopted by the occupier or affected employer for communicating with employees.

[52] The Act, *Fair Work Regulations 2009* (the **Regulations**) and the Rules do not provide explicit guidance as to what factors the Commission should consider when determining whether to hear an application under s 483AA on an ex parte basis.

[53] The Union proposes an application should be heard on an ex parte basis after consideration is given to any alleged harm the permit holder seeks to prevent by having the

matter determined on such basis, and the prospects of success should the matter be heard on a contested basis.

[54] The Object of Part 3-4 clearly establishes that a balance is to be struck between the right of unions to investigate suspected contraventions, for employees to receive at work information and representation from officials of organisations, and for employers to go about their business without undue inconvenience.

[55] The suggestion that the prospects of success of the application under s 483AA has bearing on whether the application should proceed on an ex parte basis, carries little to no weight. Engaging in such speculative exercise before having heard the matter seems very much at odds with the performance of a function that is fair and just.[41]

[56] The Commission is obliged to perform its functions in a manner that is not only fair and just, but also in a manner that open and transparent.[42] To hear an application under s 483AA on an ex parte basis, may deny both the non-member and the relevant employer the opportunity to be heard. It is a circumstance which, on its face, appears antithetical to the performance of a function in an open and transparent manner. However, ultimately, the question whether to proceed on an ex parte basis involves balancing the considerations of open justice and the interests of fairness and justice, taking into account how the order would affect each side – and in this case the interests of persons who are not party to the application.

[57] The hearing of an application under s 483AA has proceeded on an ex parte basis where the application has been accompanied by an application under s 519 of the Act.[43] It has been said that the hearing of the applications combined, no doubt proceeded ex parte due to the nature of the s 519 application.[44] Section 519 allows, of course, for the provision of an exemption certificate (exemption to provide advance notice of an entry) if the Commission reasonably believes that the advance notice of the entry might result in the destruction, concealment or alternation of relevant evidence.

[58] In *Arkwood Organic Recycling Pty Ltd T/A Arkwood Organic Recycling v Transport Workers' Union of Australia, Union of Employees (Queensland Branch)*[45] the Deputy President observed:

> **[23]** Rule 8 of the Fair Work Rules requires that applications must be served in accordance with the instructions as to service on the form for the application. The instruction on Form F43 makes it clear that there is no automatic requirement for the employer the subject of the application, to be served with the application. It is also clear from Rule 8 and the instruction on form F43 that Fair Work Australia has discretion as to whether the respondent to an application under s.483AA or any employee involved will be served and given an opportunity to be heard.
>
> **[24]** On the basis of the material contained in the application, the original applications for the s.483AA Orders, and the s.519 application made at the same time, I determined that both applications would be heard on *an ex* parte basis and that the evidentiary material would remain confidential. I did so because of the nature of the allegations and the fact that the material identified employees of Arkwood. In all of the circumstances there was no requirement to allow Arkwood to be heard in relation to the applications, and in all of the circumstances that did not constitute a denial of natural justice.

[59] Prior to hearing the application on an ex parte basis, I informed the Union and Ms Dillon that the materials before me were insufficient for the Commission to make such decision. The Union filed two witness statements and submissions in response. Attached to the witness statement of Ms Vergara dated 28 February 2023, was direct evidence of correspondence between the Respondent and the Union's Mr James.[46]

[60] The Union had voiced consternation that having sought by consent member records pertaining to Mr Joseph Santos Castillo, Mr Castillo was subsequently involved in a meeting with the Operations Manager of the Respondent in the presence of the 'PM Shift' Union Delegate. I note that the email dated 21 July 2022, refers to the object of the meeting on 20 July 2022, was to understand the alleged overtime underpayment and subsequent audit complaint from Mr Castillo's perspective, and to ask him whether he wished to provide a letter of authority allowing for the release of his personal details to the Union.[47]

[61] It is generally accepted that there is nothing unusual about an employer communicating directly to its employee about matters arising in the employment relationship. In the Union's correspondence to the Respondent dated 5 July 2022, it asked to access Mr Castillo's records, explaining it aimed to use them as an example to validate the underpayment calculations performed by the Respondent (and hence allay concerns of members that the back payment was correct). Following that correspondence there is direct evidence that a Manager of the Respondent met with Mr Castillo about the subject matter and asked whether he had any concerns in relation to his back payment. This is not withstanding that for the purpose of the application under s 739, it was the UWU who raised the dispute.

[62] As observed, the meeting that unfolded on 20 July 2022 did so in circumstances where it was the Union who had made an application under s 739 regarding the interpretation of the Ensign Agreement in respect to overtime. It appears that an agreement was reached between the Respondent and Union[48] whereby the Union saw fit to discontinue its application under s 739 on the understanding the Respondent would audit all part-time 'employees who may have been effected by this error including Mr Castillo', affected employees were to be provided with details of any error in writing and monies owed to employees were to be paid to them (accompanied by an explanatory letter).

[63] Whilst the Union asserts the meeting between the Respondent and Mr Castillo on 20 July 2022 took place to pressure Mr Castillo into withdrawing any concerns, I consider the proposition is a long bow to draw. However, in the particular circumstances of this case, where the backdrop is a dispute raised under s 739 of the Act and all that followed, calling Mr Castillo into a meeting with the Respondent's management in such circumstances is open to be perceived as intimidating notwithstanding the presence of a Union Delegate.

[64] As observed, Schedule 1 states that a Form F43 is to be served by the Applicant on occupiers and affected employers, subject to 'an order of the Commission'. Evidently then service requirement is subject to it being ordered by the Commission. In the circumstances I have declined to issue such order. I was persuaded that the application should proceed to be heard on an ex parte basis thereby enabling the potential prevention of what might be perceived as unfair treatment. With regard to such treatment, I refer to the approach adopted in respect to Mr Castillo. However, it is important to appreciate that no suggestion is made that such conduct was adverse, and I am not required by the nature of this application to arrive at such a finding.

[65] Appreciating that the Respondent has not been afforded the opportunity to be heard in respect of the application, any diminution of procedural fairness is allayed by reserving the right for the Respondent and any non-member employee to set aside the Order.

Section 438AA and the Union's submissions

[66] The Union submitted that s 483AA operates alongside s 481 to broaden the scope of documents that a permit holder can access when exercising right of entry under s 481 or when requiring the production of records under s 483 of the Act.

[67] The Union has clarified that it has not sought or received the consent of persons who are non-members to access their records; therefore none of the documents fall within the scope of the exception contained at the end of s 482(2A).

[68] The Union acknowledges that some of the categories sought are comprised of documents where each individual document would be a member or non-member record, for example contracts of employment. The Union seeks the non-member records to avoid potential detrimental impacts on members that may arise from disclosing a list of members who would be impacted by the suspected contravention. The Union also acknowledges that other documents contain a mix of both member and non-member records ('mixed documents').

[69] The Union, having referred to the meaning attributed to 'necessary' in s 483AA(2) of the Act, by Jessop J in *Independent Education Union of Australia v Australian International Academy of Education Inc*[49] (**IEUA**), a judgment that will be considered further, sought to distinguish its position from that faced by the applicant in *Application by the Maritime Union of Australia*[50] (**MUA**). The Union submitted that in *MUA* the Deputy President considered the notion of 'necessity', posing that it was the key consideration for the grant of an order under s 483AA. The Union observed that the Deputy President declined to grant an order in that matter as:

a) the applicant had records within their possession that would allow for the investigation of the suspected contravention;[51]
b) the applicant had not requested access to its members' records;[52]
c) the applicant had received some information from the respondent regarding payments;[53]
d) there was no evidence to support the assertion that union members feared reprisal if their membership was disclosed;[54]
e) the records sought were all individual employee records;[55]
f) the application was premature as the parties were litigating as to which instrument applied to employees;[56] and
g) there was no reasonable basis for the suspicion, having relied on a single payslip.[57]

[70] The Union says that some of the above reasoning applies in this application. However, the industrial instrument that applies to employees is known. The Union submits that it has attempted to resolve its suspicions using records from members, namely payslips, contracts and a rectification letter from the employer. Notwithstanding, without access to timesheets and rosters which relate to both members and non-members, the Union submits that its suspicion

will remain unresolved. The Union further submitted that this was because it is impossible to calculate what, if any, additional hours were worked without timesheets and rosters across the period.

[71] The Union pressed that it had requested records for a single member known to be impacted and not received them, albeit this request was made outside a s 481 right of entry. Referring to the Supplementary Witness Statement of Ms Dillon, the Union stated that Ms Dillon had not encountered a situation where records were not produced by consent in the past. The Union continued that most employers are willing to provide redacted records or member records on request. The Union confirmed that it has not received any records from the Respondent beyond bare statements that the concern has been resolved.

[72] The Union outlined the categories of documents sought and the rationale behind why each was necessary to investigate the suspected contravention:

a) contracts of employment are clearly capable of being non-member records and are necessary as they establish the contracted hours for each employee, and will potentially show the hours per day and week for part-time staff;
b) rosters are mixed documents and are necessary as they show the hours worked and will show whether the Respondent has required additional hours above those agreed in the contract of employment;
c) time sheets are non-member records and are necessary as they ought to show the actual hours worked on any given day;
d) pay slips are non-member records and are necessary as they show the payments received in a given time period;
e) any signed 'variation letters' that were signed by staff when additional hours were worked are non-member records and are necessary as they show any purported additional hours for which overtime should have been received';
f) audit documents produced by the Employer to resolve the alleged underpayment are intermixed records and are necessary as they would be the most expedient method for confirming or disproving the suspected contravention; and
g) any other time and wages records would include any other record or document that the Respondent produces to track hours worked and the payment for said hours other than those provided above as well as those specified in clause 25 of the Ensign Agreement. This could include clock-in/out records on time keeping equipment.

[73] The Union submits that it is impossible for it to determine whether members have been correctly paid solely on the documents available to its members, as pay slips do not identify what hours were rostered, the periods of time that were worked, the days on which members worked, and how the hours were worked across a given day or days.

[74] In relation the Murdoch Laundry, the Union holds concerns that the alleged underpayment is broader than just the part-time member base, given the Respondent's refusal to produce the records of a single member and the requirement for full-time staff to receive the first offer of additional hours under the Ensign Agreement (subclause 14.3).

Consideration

[75] First, I consider that the Ms Dillon has standing to make the application. Whilst it is true that her entry permit shortly expires, at the time the application was made it was in operation and there were no conditions imposed. Further, an application has been on foot since 21 February 2023, for Ms Dillon to obtain a further entry permit with no indication that such permit will be subject to conditions.[58]

[76] Second, I consider that the application has been made in accordance with the Act.

[77] Third, based on the evidence before me I am satisfied that there is a suspected contravention of the Ensign Agreement. Notwithstanding that the Union discontinued its application under s 739 of the Act, it did so on an understanding that the circumstances giving rise to the application were to be remedied. Having not been able to ascertain whether that has in fact happened, noting it is reliant on the mere assertion of the Respondent, a Respondent that has conceded in email correspondence to the Union on 6 July 2022 that it had made an error regarding payments to certain employees, the suspected contravention remains unassuaged. On any objective level there continues to be a suspected contravention of the Ensign Agreement.

[78] Fourth, I am satisfied that the Order is necessary to investigate the suspected contravention. In *IEUA*[59] Jessup J comprehensively addressed the interpretation of s 483AA of the Act and the meaning of 'necessary to investigate'; the following passages are extracted from the judgment:

> [109] It is apparent that the extent of a permit-holder's right to inspect and to copy documents which related only to employees who were not members of the relevant organisation has, over the years, been a sensitive question at the policy level. The balance which the legislature sought to achieve in Pt 3-4 was the subject of observation by Flick J (Tracey J concurring) in *Australasian Meat Industry Employees' Union v Fair Work Australia* (2012) 203 FCR 389, 405-406 [56]-[59]. The provisions are beneficial ones, and should be construed with an eye on the important role of organisations in protecting their members against contraventions of statutory and award provisions. But the particular provisions with which I am concerned in this case have been the subject of very detailed attention by the legislature, and involve some rather fine discriminations which, the history shows were consciously made.
>
> [110] Returning to the terms of Pt 3-4 of the FW Act itself, s 482 operates only where there is suspicion of contravention which relates to, or affects, a member of the permit-holder's organisation (and then only where the organisation is entitled to represent the industrial interests of that member, and the member works on the premises concerned). The section permits the permit-holder to inspect any work, process or object that is relevant to the suspected contravention. Insofar as this provision relates to work, it is not limited to work done by the member concerned – nor even, for that matter, by a member – but it must be relevant to the suspected contravention. Under para (b) of subs (1), the person who may be interviewed is not limited to a member of the organisation (but is limited in other ways). And, absent the passage in parenthesis, the right to inspect and to copy a record or document would not be so limited either, but the record or document has to be directly relevant to the suspected contravention and be kept on the premises or accessible from a computer kept on the premises.
>
> [111] But the passage in parenthesis places a further limit on the range of records and documents that may be inspected and copied under para (c) of subs (1). So, even a document which is kept on the premises and which is directly relevant to the suspected contravention may not be

> inspected or copied if it falls within the definition of "non-member record or document" in subs (2A). It is only with such a document that s 483AA is concerned.
>
> [112] Section 483AA shows that the legislature recognised that there may be situations in which, for the proper investigation of the suspected contravention, it was necessary for the parenthetical exclusion in s 483(1)(c) to be lifted. The notion of "necessary" in s 483AA(2) carries the meaning that the investigation could not be properly investigated with that exclusion in place. Whether or not that would be so in a particular case was a matter for the satisfaction of FWA (as the Commission was called at the time of the facts of the present case). Absent the availability of a conventional ground of administrative law challenge (such as that made by the respondents here), the question whether a s 483AA order was necessary in a particular case would not be justiciable elsewhere.
>
> [113] As a measure of how limited is the process for which s 483AA provides, FWA was required to consider the matter of necessity not in the broad, but only in relation to "specified nonmember records or documents". Thus, although under s 482(1)(c) in its primary operation it was a matter for the permit-holder (at least in the first instance) to identify the records or documents sought to be inspected and copied, in the operation of the paragraph as extended by an order made under s 483AA it was a matter for FWA to specify the non-member records or documents that might also be inspected and copied.
>
> [114] Whatever order might have been made in a particular case under s 483AA, the permitholder's right to require inspection and copying of non-member records or documents could not travel beyond the other limits imposed in s 482(1)(c). Put another way, even with the assistance of such an order, he or she could never have a right to require inspection and copying of non-member records or documents more extensive than his or her right to require inspection and copying of other records or documents. Specifically in the context of the respondents' point in the present case, those records or documents had to be directly relevant to the contravention − being one which related to or affected a member − which the permitholder suspected.
>
> [115] It follows, in my view, that the question which FWA was required to address under s 483AA was whether it was necessary, for the proper conduct of the investigation, that the documents which the permit-holder was entitled to require to be inspected or copied under s 482(1)(c), as being directly relevant to the contravention, included non-member records and documents as defined.

[79] Turning then to the phrase 'necessary to investigate the suspected contravention' and the categories of documents sought by the Union. Several of those non-member document categories, whether employment contracts or pay slips are not, in my view 'necessary to investigate the suspected contravention'. Let me explain further. The Union has disclosed that without access to *timesheets* and *rosters* which relate to both members and non-members, its suspicion will remain unresolved (mixed documents). The Union has further submitted that the access to these specific non-member records is necessary because it is impossible to calculate what, if any, additional hours were worked without timesheets and rosters across the period. The reasons for the production of such non-member documents are entirely plausible and I consider that these particular documents fall within the category of non-member document. The question then is why are the other categories of documents sought (aside from the audit material)?

[80] The Union has provided an answer to this in part, submitting that it acknowledges that some of the categories sought are comprised of documents where each individual document

would be a member or non-member record, for example contracts of employment or payslips. The Union seeks the documents as non-member records to avoid potential detrimental impacts on members that may arise from disclosing a list of members who would be impacted by the suspected contravention. Essentially, the Union does not wish to disclose to the Respondent a list of its members on whose behalf it is investigating the suspected contravention, due to concerns that members may be targeted.

[81] In *Beau Seiffert*[60] the applicant applied for an order under s 483AA in circumstances where a notice had issued under s 481 and the employer had requested of the permit holder a list of employees who were members of the CFMEU (as it was at that time). The applicant explained to the Commission that providing names of members to the employer may jeopardise their employment and therefore he considered it necessary for an order to be made to allow the CFMEU to access records of members and non-members, without disclosing which employees of the employer were members of the CFMEU. The Commission on that occasion acquiesced to the application, stating:

> [9] I am not satisfied that it is necessary or appropriate for the CFMEU to have access to employees' home addresses. If the documents contain details of the employees' phone numbers and/or email addresses, I consider that to be a sufficient and appropriate method of contact for the CFMEU to alert any employees or former employees to any suspected contraventions. The order will include an obligation to redact from any of the documents an employee's home address.
>
> [10] Section 483AA states that the Commission may make an order if it is satisfied that the order is necessary to investigate the suspected contravention and must take into account any conditions imposed on the permit holder's entry permit.
>
> [11] I am satisfied that the orders being sought, subject to the qualification made by at [9] are necessary to investigate the suspected contraventions. I am satisfied that Mr Seiffert does not have any conditions imposed on his entry permit.

[82] Appreciating that these types of applications may at times be heard on an expedited basis (in *Seiffert* the notice of entry had issued under s 481), it is understandable that detailed reasons may not disclose why an order is 'necessary to investigate the suspected contravention'.

[83] The suspected contravention in this case is a breach of s 50 of the Act. The 'suspected contravention' and what is 'necessary to investigate' that same contravention, are critical considerations in determining whether the Commission exercises discretion to grant the order sought. Section 483AA provides the means to enable a proper investigation of the suspected contravention by lifting the exclusion in s 481(1)(c).[61] That 'proper investigation' is centred on the breach and the question to be asked is whether the *non-member records* or documents are necessary not in the broad, but only in relation to the 'specified non-member records or documents'.[62]

[84] The Union has advanced cogent reasons for the production of the timesheets and rosters. Those reasons centre on calculating, what, if any, additional hours were worked. On any objective level it can be seen that these non-member documents are required for a proper investigation by the Union. The Union, by use of the non-member documents, seeks to ascertain whether members have worked hours in excess of (a) their ordinary rostered hours; (b) in excess of 7.6 hours; and (c) in excess of 38 hours per week. There is, in addition, the Union's point

that if an employee is given less than 24 hours' notice to work a shift, unless mutually agreed overtime is to be paid on the entire shift. The Union clearly holds the view that part-time employees who worked additional hours above their contracted hours would receive overtime rates for all additional hours worked.[63]

[85] In *IEUA* the Federal Court stated that the 'notion of "necessary" in s 483AA(2) carries the meaning that the investigation could not be properly investigated with that exclusion in place'.[64] Further, the records or documents have to be directly relevant to the contravention – the contravention being one which relates to or affects a member – which the permitholder suspects.[65] The employment contract of a non-member is not, in these circumstances directly relevant to the suspected contravention. I find similarly in respect of the pay slips of non-members and signed variation letters.

[86] The Union seeks to avail itself of a legislative cloak, to effectively protect against having to disclose the identity of its members. It does so, based upon an apprehension that the absence of such may play part in potential adverse action being taken against members. I am unpersuaded that the order sought in its current form is what is required for a *proper investigation* into the suspected contravention. The legislature has clearly enacted provisions to protect employees from adverse action and s 438AA does not fall within that Part.

[87] With respect to 'any other time and wages records' which is said to include any other record or document that the Respondent produces to track hours worked and the payment for said hours, the category is absent the specificity required to understand what it is that is to be produced for inspection. Initially, I held the view that this held the same for the category of document referred to as 'audit documents'. However, in Mr Griffin's email dated 19 April 2022 to Ms Sayed, he refers to an 'audit sheet'.[66] I therefore consider that the term 'audit sheet' is of sufficient specificity to be understood. Further, in light of the contents of the contents of the direct evidence I am satisfied that the 'audit sheet' falls within the definition at s 482(2A) and is directly relevant to the suspected contravention.

[88] Section 599 of the Act sets out that the Commission is not required to decide an application in the terms applied for. In light of my aforementioned reasons the Order that will issue will be confined to those non-member documents that are necessary for the proper investigation of the suspected contravention, namely rosters, timesheets and the 'audit sheet'.

Conclusion

[89] As identified in the introduction to this decision, I have determined that an Order will issue. Further, I consider the period proposed by the Union for the operation of the Order is appropriate.

DEPUTY PRESIDENT

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<PR751318>

[1] [2020] FWCA 1338; AE507399 PR717437.

[2] PR751319.

[3] [2019] FWC 5448

[4] [2020] FWCA 1338; AE507399 PR717437.

[5] Form F43 – Application for an order for access to non-member records [2.3].

[6] [2020] FWCA 1338

[7] Witness Statement of Elizabeth Vergara (**Vergara Statement**) [4].

[8] Ibid [3].

[9] Ibid [6].

[10] Ibid.

[11] Ibid, Annexure EV-1.

[12] Form F43 – Application for an order for access to non-member records [2.3].

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Vergara Statement [11].

[19] Ibid.

[20] Ibid [12].

[21] Form F43 – Application for an order for access to non-member records [2.3].

[22] Ibid Annexure 3.

[23] Ibid.

[24] Witness Statement of Rhys David James (**James Statement**) [3].

[25] Ibid. [4].

[26] Ibid..

[27] Ibid..

[28] Ibid. [5].

[29] Form F43 – Application for an order for access to non-member records pg.33; Vergara Statement Annexure EV-6.

[30] Vergara Statement [14].

[31] Ibid.

[32] Ibid.

[33] Form F43 – Application for an order for access to non-member records pg.32.

[34] Vergara Statement [15].

[35]Ibid.

[36] Ibid.

[37] Supplementary Witness Statement of Louise Dillon [5].

[38] Section 482(1)(c).

[39] See Amendment PV373.

[40] Fair Work Commission Amendment (Entry Permits and Other Measures) Rules 2019 Explanatory Statement, Item 61 (F2019L01000) (Available through: https://www.legislation.gov.au/Details/F2019L01000/Explanatory%20Statement/Text#:~:text=The%20Fair%20Work%2

0Commission%20Amendment%20%28Entry%20Permits%20and,Rules%20with%20new%20rules%2011%2C%2012%20and%2012A).

[41] Section 577(a) of the Act.

[42] Ibid.

[43] Fair Work Australia [2011] FWA 4096 [8].

[44] Ibid.

[45] [2012] FWA 8916.

[46] Vergara Statement Annexure EV-6.

[47] Ibid.

[48] Form F43 – Application for an order for access to non-member records pg 25.

[49] [2016] FCA 140.

[50] [2017] FWC 6228.

[51] [2017] FWC 6228 [68].

[52] Ibid [69].

[53] Ibid [69].

[54] Ibid [69].

[55] Ibid [63].

[56] Ibid [71]-[73].

[57] Ibid [75]-[76].

[58] RE2023/141.

[59] [2016] FCA 140.

[60] [2018] FWC 1439.

[61] *IEUA* [112].

[62] Ibid.

[63] F43 – Application for an order for access to non-member records [2.3].

[64] *IEUA* [112].

[65] Ibid [114].

[66] Form F43 – Application for an order for access to non-member records [2.3] Annexure [3].